RECORD AND BRIEFS

No. 16-980

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SUPREME COURT, U.S.

In The Supreme Court of the United States

JON HUSTED, Ohio Secretary of State,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, NORTHEAST OHIO COALITION FOR THE HOMELESS, and LARRY HARMON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Does Ohio's "Supplemental Process" – a voter roll-maintenance process that relies solely on an individual's failure to vote during a two-year period to trigger a process to remove the individual from the voter rolls – violate Section 8 of the National Voter Registration Act of 1993, 52 U.S.C. § 20507(b)(2), which prohibits any roll-maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote"?

CORPORATE DISCLOSURE STATEMENT

Respondent Ohio A. Philip Randolph Institute has no parent company, and no publicly traded company owns 10% or more of its stock.

Respondent Northeast Ohio Coalition for the Homeless has no parent company, and no publicly traded company owns 10% or more of its stock.

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INTRODUCTION

This case involves a narrow issue of statutory construction that only one circuit has addressed: whether Ohio's unique "Supplemental Process" for eliminating registered voters from the rolls violates the National Voter Registration Act of 1993 ("NVRA"). Though Petitioner alleges that other states will be impacted by resolution of this question, the majority of those states have procedures entirely distinct from Ohio's Supplemental Process. And litigation in the handful of states with procedures similar to Ohio's has barely begun to percolate. Accordingly, Petitioner's claims of widespread impact are both exaggerated and premature. The Court should deny the petition for a writ of certiorari for these reasons alone.

Moreover, the decision below was correct. The NVRA prohibits any voter-list maintenance program for federal elections that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). This provision reflects the basic principle that, just as every eligible voter has the constitutional right to vote, each one also has the right *not* to cast a vote – and the mere exercise of that right should not be the basis for removal from the voter rolls. Under the NVRA, one's failure to vote may play only a narrow and carefully circumscribed role: only after a state receives an independent and affirmative indication that a voter may have moved (such as a change of address filed with the U.S. Postal Service) does the NVRA permit a state to send the voter a notice and to remove the

voter for failing to respond and failing to vote during the two subsequent federal election cycles. *See generally id.* § 20507(a)-(d). In sum, a voter's failure to vote can be used only to confirm pre-existing evidence that the voter has moved, but it cannot itself be the reason why a voter is initially identified for removal from the rolls.

Under Ohio's "Supplemental Process," however, a voter's failure to vote during a mere two-year period – a single election cycle – is the trigger for a change-of-address confirmation process that results in the voter's removal from the registration list unless the voter takes affirmative action in the subsequent four-year period. Applying the plain language of the NVRA and settled canons of statutory construction, the Sixth Circuit correctly concluded that this "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." Pet. App. at 24a (quoting 52 U.S.C. § 20507(b)(2)). Because of Ohio's flawed process, thousands of eligible Ohio voters would have been denied their fundamental right to vote in the November 2016 General Election absent the court's intervention. *See* Pet. at 14.

The Petitioner presents no sound basis for disturbing the Sixth Circuit's textual interpretation of the NVRA. Petitioner first claims that this case raises constitutional concerns because the Elections Clause of the U.S. Constitution, U.S. CONST. art. I, § 4, cl. 1, allows Congress to regulate only the time, place, and manner of federal elections and not a state's voting

qualifications. But in *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2253 (2013) ("*ITCA*"), this Court squarely reaffirmed that the NVRA's registration procedures fall within Congress's power under the Elections Clause, and in any case, neither Ohio nor any other state identified by Petitioner has established registration or frequent voting as voter qualifications.

Similarly unavailing is Petitioner's second argument that a provision in the later-enacted Help America Vote Act of 2002 ("HAVA"), amended the NVRA's requirements. 52 U.S.C. § 21083(a)(4)(A). In fact, Congress expressly specified that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." *Id.* § 21145(a).

In any event, this case is a poor vehicle to address the question presented because it arises in an interlocutory posture. The Court should not review the case while lower court proceedings that could shed light on the questions raised are incomplete. The petition should be denied.

STATEMENT OF THE CASE

A. Statutory Background

Congress passed the NVRA to combat what it found to be "discriminatory and unfair [state] registration laws and procedures" that "have a direct and damaging effect on voter participation in [federal]

elections." *Id.* § 20501(a)(3). It sought to replace the "complicated maze of local laws and procedures . . . through which eligible citizens had to navigate in order to exercise their right to vote" – procedures that were "in some cases as restrictive as the . . . practices" outlawed by the Voting Rights Act. H.R. REP. NO. 103-9, at *3 (1993). In regulating state registration laws and procedures for federal elections, Congress acted pursuant to its authority under the Elections Clause of the Constitution, which empowers Congress to displace state regulations concerning the "Times, Places, and Manner" of holding elections for federal office. U.S. CONST. art. I, § 4, cl. 1.

The NVRA prohibits any voter-list maintenance program that "result[s] in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2) ("Failure-to-Vote Clause"). In forbidding states from removing voters from the rolls "by reason of" their failure to vote, Congress sought to protect the right of citizens to choose when they vote, and not to punish them for exercising their right not to cast a ballot in a particular election. As the Senate Report explained, "while voting is a right, people have an equal right not to vote" and "eligible citizens [should not be required] to re-register when they have chosen not to exercise their vote." S. REP. NO. 103-6, at *17-18 (1993). The legislative history is replete with references to the unfairness of "penaliz[ing] . . . non-voters by removing their names from the voter registration rolls merely because they have

failed to cast a ballot in a recent election."[1] And Congress understood that the failure to vote does not mean that a voter has changed residence – given the sadly low turnout of American elections, that would suggest that half of the nation's voters change residence during every federal election cycle – which is clearly not the case. *See* S. REP. NO. 103-6, at *18.

Under the NVRA, failure to vote plays a very narrow role in the removal process; it serves solely as one component of a back-end procedure to *confirm* that a voter has changed residence, used only *after* the state has received an independent and affirmative indication that the voter has moved. The NVRA's model list-maintenance program, sometimes called the "safe

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[1] S. REP. NO. 103-6, at *17; *see also, e.g.*, *id.* at *2 (The NVRA "provide[s] procedures and standards regarding the maintenance [of registration rolls] to assure that voters' names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction and to assure that voters are not required to re-register except upon a change of voting address to one outside their current registration jurisdiction."); *id.* at *18 ("[P]urging for non-voting tends to be highly inefficient and costly. It not only requires eligible citizens to re-register when they have chosen not to exercise their vote, but it also unnecessarily places additional burdens on the registration system because persons who are legitimately registered must be processed all over again."); H.R. REP. NO. 103-9, at *15 (expressing concern that state list-maintenance programs "may result in the elimination of names of voters from the rolls solely due to their failure to respond to a mailing"). Congress was aware this practice had the effect, and in some cases the purpose, of reducing registration rates and, consequently, participation in federal elections. *E.g.*, H.R. REP. NO. 103-9, at *2 (identifying "annual reregistration requirements" as among "the techniques developed to discourage participation" around the turn of the twentieth century); S. REP. NO. 103-6, at *3 (same).

harbor," demonstrates how one's failure to vote can be part of the back-end confirmation process. As described in Section 8(c) of the NVRA, states may use information obtained from the U.S. Postal Service's National Change of Address ("NCOA") system, a database of individuals and businesses that have forwarding addresses on file with the Postal Service, to identify voters who may have moved out of the relevant voting district. *See* 52 U.S.C. § 20507(c)(1). Once a state has received NCOA information for a particular voter, the NVRA allows the state to initiate a procedure designed to confirm the address change. That confirmation process starts by the state mailing the voter a notice to which the voter may respond to confirm or correct the change-of-address information. The voter's registration may then be canceled only if the voter: (1) confirms a change in residence out of state or to a new jurisdiction within the state where the voter would need to re-register; or (2) fails to respond to the notice and fails to vote during the two subsequent federal election cycles. *Id.* § 20507(d)(1) ("Address-Confirmation Procedure").

In sum, failure to vote may play only a narrow role at the end of the NVRA removal process – as part of a carefully articulated procedure designed to *confirm* that a voter has changed residence *after* the state receives independent and affirmative information that the voter may have moved (such as from the Postal Service's NCOA system under the NVRA "safe harbor"). To be sure, states are not limited to using the NCOA system – other information affirmatively indicating a

change of address may be used to initiate the removal process. But by prohibiting removal of voters "by reason of" failure to vote, Congress expressly determined that mere failure to vote cannot *itself* be the reason for initiating the NVRA's Address-Confirmation Procedure. *See id.* § 20507(a)-(d).

With the passage of the Help America Vote Act of 2002 ("HAVA"), Congress required states to establish a computerized statewide voter-registration database, and mandated that the database be maintained in accordance with the procedures and requirements of the NVRA. *See id.* § 21083. The specific provision in HAVA that Petitioner claims superseded and altered the NVRA is Section 303(a)(4)(A), which provides that:

> The State election system shall include . . . [a] system of file maintenance that makes a reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the [NVRA], registrants who have not responded to a notice and who have not voted in 2 consecutive general elections for Federal office shall be removed from the official list of eligible voters, except that no registrant may be removed solely by reason of a failure to vote.

Id. § 21083(a)(4)(A). Importantly, Congress took pains to explain that this provision should not be read as altering the NVRA's prohibition on removal "by reason of" a failure to vote: Not only does Section 303 itself require that it be construed "consistent with the

[NVRA]," *id.*, but HAVA elsewhere provides that, with one exception not relevant here, "nothing in [Chapter 209, which includes Section 303,] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." 52 U.S.C. § 21145(a).

HAVA also added an explanatory proviso (the "Except Clause"), clarifying that even though a voter's failure to vote generally "shall not result in the removal" of the voter's name from the rolls, there is a singular exception: when a state is using one's failure to vote as part of the Address-Confirmation Procedure described above. *Id.* § 20507(b)(2). Reading HAVA's provision in context makes this clear:

> Any State program or activity to protect the integrity of the electoral process by ensuring the maintenance of an accurate and current voter registration roll for elections for Federal office . . . shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote, *except that* nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual – (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then (B) has not voted or appeared

> to vote in 2 or more consecutive general elections for Federal office.

Id. (emphasis added). By citing subsections (c) and (d), *id.* § 20507(c), (d) – *i.e.*, the provisions describing the NVRA "safe harbor" and the Address-Confirmation Procedure – the Except Clause simply sought to clarify that while the Failure-to-Vote Clause prohibits using failure to vote as the reason for initiating removal, it does not prohibit using failure to vote as a component of the very specific Address-Confirmation Procedure that occurs *after* a jurisdiction receives affirmative information indicating that a voter has changed residence. *See* Pub. L. No. 107-252, § 903 (2002) (headnote describing the amendment as a "[c]*larification* of [the] ability of election officials to remove registrants from [the] official list of voters on grounds of [a] change of residence") (emphasis added); *see also* H.R. REP. NO. 107-730, at 81 (2002) (Conf. Rep.) (noting that HAVA "leaves NVRA intact, and does not undermine it in any way" and that "[t]he procedures established by NVRA that guard against removal of eligible registrants remain in effect").

B. Ohio's Supplemental Process

This case only challenged a specific part of Ohio's process for voter-roll maintenance. In large part, Ohio's statutes adopt the NVRA's "safe harbor" provision, relying first on information from the U.S. Postal Service's NCOA system as evidence that a voter

has moved, and then tracking the NVRA's Address-Confirmation Procedure to cancel the voter's registration only if the voter fails to respond to a confirmation notice and fails to vote in the subsequent four years.

Ohio's statutes also permit – but do not require – the Secretary of State to promulgate additional list maintenance procedures. OHIO REV. CODE § 3501.05(Q)(1) (requiring the Secretary of State develop "[a] process for the removal of voters who have changed residence . . . including a program that uses the national change of address service provided by the United States postal system"). Under this authority, the Ohio Secretary of State has issued directives that establish a "Supplemental Process" in addition to the statutory safe harbor process.[2] Under this process, Ohio presumes that a two-year period of voter inactivity – *i.e.*, missing a single federal election cycle – indicates that the voter "may have moved."[3] Ohio thereby penalizes voters who decide not to vote, or are unable to do so, by initiating the Address-Confirmation Procedure – and then removing them if they take no further action beyond continuing not to vote.

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[2] *See* Damschroder Decl., RE38-2, PageID#294; *see also, e.g.*, Directive No. 2015-25, "Chapter 3: Voter Registration," § 1.11(f), at 3-70 (December 15, 2015) ("Directive No. 2015-25"), *available at* https://www.sos.state.oh.us/SOS/Upload/elections/directives/2015/Dir2015-25_EOM-CH_03.pdf. Similar directives have been issued biennially or, in recent years, annually since 1994. Damschroder Decl., RE38-2, PageID#294.

[3] *See, e.g.*, Directive No. 2015-25, at 3-71.

C. The Proceedings Below

On April 6, 2016, after having notified the Petitioner Secretary of State that Ohio's Supplemental Process violates Section 8 of the NVRA, Respondents filed suit in the U.S. District Court for the Southern District of Ohio. Complaint, RE1. After limited discovery and briefing, the district court granted judgment in favor of Petitioner on June 29, 2016. Pet. App. at 69a-70a. Respondents filed a notice of appeal the following day. Notice of Appeal, RE68. Because of the impending Presidential election, the Sixth Circuit ordered expedited briefing and argument. Order (Doc. 14), *A. Philip Randolph Inst. v. Husted*, No. 16-3746 (6th Cir. July 6, 2016).

On September 23, 2016, the court of appeals reversed the district court's judgment, applying ordinary principles of statutory construction to conclude that the Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote."[4] Pet. App. at 24a.

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[4] After concluding that Ohio's Supplemental Process violated Section 8's prohibition on removing voters from the rolls by reason of a failure to vote, the Sixth Circuit did not analyze Respondents' alternative argument that, in light of evidence that it consistently resulted in the erroneous removal of many eligible voters, the Supplemental Process also violates Section 8 because it does not constitute a "reasonable effort" to remove voters who have become ineligible by reason of a change in residence. *See* Pet. App. at 23a-24a.

The Sixth Circuit began with the text of Section 8 of the NVRA. It observed that under subsection (a), "each State shall . . . provide that the name of a registrant *may not* be removed from the official list of eligible voters *except*" under certain circumstances. *Id.* at 11a (quoting 52 U.S.C. § 20507(a)(3)). It noted that this provision was followed by "additional constraints on states' discretion," including the prohibition on removing voters based on their failure to vote. Pet. App. at 11a-12a. And it concluded that Ohio's Supplemental Process violated that mandate because it used a person's failure to vote as the trigger for a process that would result in removal if the voter took no further action. The court acknowledged the later enactment of HAVA – and the narrow exception for when failure to vote may be used in the confirmation process – but it also recognized HAVA's admonishment that it not "be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of [the NVRA]." *Id.* at 12a (quoting 52 U.S.C. § 21145(a)).

The Sixth Circuit then applied several settled canons of statutory construction to reject Petitioner's argument that he could use the failure to vote under the Supplemental Process to trigger removing someone from the rolls. First, examining the NVRA's text, the court applied the canon of statutory construction requiring courts to "proceed from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." Pet. App. at 21a (quoting *Sebelius v. Cloer*,

133 S. Ct. 1886, 1893 (2013)). The court observed that "Webster's dictionary defines 'result' as 'to proceed or arise as a consequence, effect, or conclusion.'" Pet. App. at 21a (citation omitted). It then reasoned that "the Supplemental Process' trigger provision explicitly uses a person's failure to engage in any 'voter activity' – which includes voting – for two years as the 'trigger' for sending a confirmation notice." *Id.* Thus, "[u]nder the ordinary meaning of 'result' the Supplemental Process would violate the prohibition clause because removal of a voter 'proceed[s] or arise[s] as a consequence' of his or her failure to vote." *Id.*

Second, the court rejected Petitioner's contention that the NVRA's Failure-to-Vote Clause was "given a more narrow interpretation by . . . HAVA," which provides that "no registrant may be removed *solely* by reason of a failure to vote." Pet. App. at 21a-22a (quoting 52 U.S.C. § 21083(a)(4)(A)). The Sixth Circuit reasoned that the term "solely" did not preclude a finding that Ohio's Supplemental Process violated the NVRA because "operation of the Supplemental Process' trigger is ultimately based 'solely' on a person's failure to vote." Pet. App. at 22a. Applying the rule against surplusage, the court rejected Petitioner's argument that HAVA's use of the term "solely" showed that the NVRA was intended simply to prohibit states from removing voters for failing to vote without following the NVRA's Address-Confirmation Procedure. Observing that the NVRA, under Section 8(d), *always* requires a state to use the Address-Confirmation Procedure when removing voters, the court held that Petitioner's reading of

"solely" left no room for the Failure-to-Vote Clause to have any effect. If HAVA's restriction on removing voters "solely" for failure to vote meant only that a state had to follow the confirmation procedures of Section 8(d), the Failure-to-Vote Clause would be reduced to mere surplusage: Any program that complied with Section 8(d) would be permissible under the Failure-to-Vote Clause and thus, the Failure-to-Vote Clause would be unnecessary. *Id.* at 17a-18a. And the court appropriately declined "'to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" *Id.* at 23a (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)).[5]

Accordingly, the court of appeals reversed the district court's judgment and remanded for further proceedings with respect to a remedy for the state's NVRA violation.

On remand, the district court entered an interim injunction, which applied only to the November 2016 election. Under that injunction, any provisional ballot cast by certain voters who were removed pursuant to the Supplemental Process would be counted. Specifically, the district court ruled that, for the November 2016 General Election: (1) any voter who had been purged under the Supplemental Process in 2011, 2013,

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[5] For substantially the same reasons, the Sixth Circuit rejected Petitioner's argument that HAVA's Except Clause provides affirmative authorization for Ohio's Supplemental Process – an argument Petitioner seems to abandon in this petition. *See* Pet. App. at 15a-18a.

or 2015 must be able to cast a provisional ballot in-person at their early voting location or on Election Day, and (2) that such provisional ballots would be counted so long as the voter continued to reside in the county where they were registered at the time that they were unlawfully removed from the registration rolls and the voter had otherwise remained continuously eligible since last voting. Pet. App. at 94a-100a. Petitioner subsequently stipulated to court orders requiring the Secretary of State to count ballots cast by two additional categories of voters affected by the Supplemental Process: (1) voters unable to vote in person due to illness or disability; and (2) uniformed and overseas voters.[6] As a result of these orders, at least 7,515 qualified Ohio voters who had been removed from the rolls pursuant to the Supplemental Process had their votes counted. Pet. at 14.

Proceedings are ongoing before the district court. Because the decision of the court of appeals addressed only the issue of liability and the interim relief ordered by the district court applied only to the November 2016 election,[7] the parties are engaged in additional discovery and proceedings concerning the appropriate permanent relief. Primarily, the parties dispute the number of eligible voters who have been affected by the

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[6] *See* Joint Motion for Further Relief, RE91; Order, RE92; Order, RE93.

[7] Petitioner later stipulated to extend the interim relief to a special recall election held in Cuyahoga County, Ohio on December 6, 2016, *see* Joint Motion for Further Relief, RE94, but no ongoing preliminary injunction is in place pending final resolution of the litigation.

Supplemental Process, and accordingly what form the permanent relief should take. The district court's interim order covers only those who cast a provisional ballot in the November 2016 General Election, and does not include those who chose not to vote in that election but might wish to vote in the future, nor does it include certain other categories of voters affected by the Supplemental Process, such as vote-by-mail voters, who may have attempted to vote in November but been unable to. Motions and briefing at the remedial phase of this case are set to conclude in the district court on July 25, 2017.

REASONS WHY THE PETITION SHOULD BE DENIED

This Court should deny Petitioner's request for a writ of certiorari for four reasons. *First*, the Sixth Circuit is the only appellate court that has addressed this issue, so there is no circuit conflict requiring this Court's resolution. *Second*, Petitioner has failed to establish that the Sixth Circuit's decision will have widespread impact, as the vast majority of the states that Petitioner contends are affected have list-maintenance procedures that are readily distinguishable from Ohio's Supplemental Process. *Third*, the Sixth Circuit's decision was correct and comports with the decisions of this Court. It applied settled canons of statutory interpretation to a federal statute that was duly enacted pursuant to Congress's constitutional authority over the states' voter-registration procedures for federal

elections. *Finally*, the decision below presents a poor vehicle for review given its interlocutory posture.

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS.

Petitioner does not – and cannot – contend that there is any split of authority among the courts of appeals on the question presented. No other court of appeals has even addressed the question of the scope and meaning of the NVRA's prohibition on removing voters from the rolls based on their failure to vote. The absence of a circuit split counsels strongly against this Court's review. *See* Sup. Ct. Rule 10(a); *see also Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for . . . certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923) ("The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given . . . to secure uniformity of decision between those courts in the nine circuits.").

II. PETITIONER HAS FAILED TO DEMONSTRATE THAT THE SIXTH CIRCUIT'S DECISION WILL HAVE WIDESPREAD IMPACT.

The Sixth Circuit's decision was exceedingly narrow. It held simply that the NVRA prohibits the Ohio

Secretary of State from relying solely on a voter's failure to vote to initiate a process for removing the voter from the rolls. Petitioner references "many States" that he contends have practices similar to Ohio's Supplemental Process. Pet. at 17-19. The vast majority of states across the nation, however, including almost all of the states cited by Petitioner, have established roll-maintenance practices that, unlike Ohio's Supplemental Process, use independent and reliable information that an individual has changed address – not a mere failure to vote – to initiate the Address-Confirmation Procedure set forth in Section 8 of the NVRA to ensure that the voter has moved. Moreover, nothing in the Sixth Circuit's decision prevents states from using the many available tools for maintaining their voter rolls that do not improperly rely on failure to vote.

A. The Majority of States Petitioner Cites Do Not Have Processes Comparable to Ohio's for Removing Voters from the Rolls.

In five of the states Petitioner cites – Alaska, Florida, Rhode Island, South Dakota, Missouri, and Kansas – the NVRA's Address-Confirmation Procedure is not triggered by a mere failure to vote as it is under Ohio's Supplemental Process. Rather, in these states, the process for removing a voter based on change of address is initiated after election-related mail to the

voter is returned as undeliverable.[8] Pet. at 18 (citing ALASKA STAT. § 15.07.130(a)-(b); FLA. STAT. § 98.065(2)(c); R.I. GEN. LAWS § 17-9.1-27(b); S.D. CODIFIED LAWS § 12-4-19; MO. STAT. §§ 115.181(2), 115.193; KAN. STAT. § 25-2354(a)). In some cases, the removal process may be started by the return of election-related mail that is sent to all registered voters in a jurisdiction. *E.g.*, FLA. STAT. § 98.065(2)(b). In others, the removal process is triggered when a postcard sent to voters who had not voted in one or more elections is returned as undeliverable. *E.g.*, *id.* § 98.065(2)(c); ALASKA STAT. § 15.07.130(a)-(b); *cf.* KAN. STAT. § 25-2354(a) (permitting mass or targeted mailings). But even in those states, a mere failure to respond to that postcard would not result in the voter's removal; the postcard has to be undeliverable to the voter as addressed. In either case, therefore, only if the mailing is returned as undeliverable – providing evidence that the voter has changed residence *independent of the failure to vote* – do these states begin the removal process by sending a notice to that voter, and, if the notice is not returned, removing the voter from the rolls if the voter does not vote in the next two federal election cycles. None of these states would be required to amend

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[8] Montana, too, uses returned mail as a trigger for the Address-Confirmation Procedure. MONT. CODE § 13-2-220. In Montana, however, the Change-of-Address-Confirmation Procedure may also be triggered when a voter does not respond to an initial confirmation mailing. This circumstance may raise issues similar to those present here, but the necessity of two confirmation mailings – as well as the fact that in Montana, voters can register on Election Day if they have been improperly purged – distinguishes the state's procedures from Ohio's. *See id.* §§ 13-2-220, 13-2-304.

its procedures based on the Sixth Circuit's decision below, which invalidated Ohio's Supplemental Process because it used failure to vote, and not independent evidence of a change of address, as the sole trigger for the Address-Confirmation Procedure.[9]

Petitioner also points to North Carolina, Nevada, Arkansas, Kentucky, Louisiana, Texas, Mississippi, and South Carolina, asserting that, like Ohio, these states delegate to their chief election officials the authority to determine what roll-maintenance practices to deploy to identify voters who may have moved. Pet. at 18-19. But Petitioner offers no record evidence that *any* of these states' chief election officials have followed the example of the Ohio Secretary of State by promulgating a removal procedure triggered by nothing more

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[9] Indeed, three of the states Petitioner identifies, Alaska, South Dakota, and California, did formerly have list-maintenance practices similar to Ohio's, but abandoned that practice in response to enforcement actions brought by the U.S. Department of Justice. *See* Letter dated Feb. 11, 1997, from Isabelle Katz Pinzler to Mark Barnett, Ex. 2 to Brief of the United States Department of Justice as *Amicus Curiae* ("DOJ Amicus Brief"), Doc. 29, *A. Philip Randolph Institute v. Husted*, No. 16-3746 (6th Cir. 2016), at 82-83; Letter dated Feb. 11, 1997, from Isabelle Katz Pinzler to Bruce M. Botelho, Ex. 3 to DOJ Amicus Brief, at 85-86; S.D. CODIFIED LAWS § 12-4-19 (describing a process that relies on returned mail, not failure to vote, to trigger the Address-Confirmation Procedure); ALASKA STAT. § 15.07.130(a)-(b) (same); Joint Stipulation to Substitute Language, Ex. 1 to DOJ Amicus Brief, at 78 (stipulating to order requiring state to use undeliverable mail to trigger removal process rather than failure to vote); CAL. ELEC. CODE § 2224(a) (authorizing a residency confirmation postcard to be sent to nonvoters, but stating that non-voting shall not be used to trigger the removal process).

than a failure to vote. Rather, Petitioner relies on rank speculation that some of these states "may have previously relied on nonvoting to send notices" or "could do so in the future." *Id.*[10]

Likewise, Petitioner's citation to Illinois, Hawaii, and Iowa is misguided. Illinois and Hawaii maintain pre-NVRA statutes on their books that require the removal of infrequent voters with minimal or no notice, but Petitioner offers no evidence that either state is actually enforcing these provisions. *See* HAW. REV. STAT. § 11-17; 10 ILL. COMP. STAT. 5/4-17, 5/5-24, 5/6-58; ILL. ADMIN. CODE § 216.50(b).[11] Iowa permits officials to

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[10] Grasping for support, Petitioner points to a 2009 press release from the South Carolina Election Commission and a Frequently Asked Questions page on the Nevada Secretary of State's website. Both documents self-evidently contradict Petitioner's claims. First, although it suggests that the State may once have conducted a confirmation process and removed voters based on a failure to vote, the South Carolina press release states that, unlike voters purged under Ohio's Supplemental Process, in South Carolina "[e]ven after being removed [for failing to vote], voters who are still eligible will be permitted to vote." Pet. at 19 (citing S.C. State Elections Comm'n, "SEC Sends Notice to Inactive Voters" (May 6, 2009), https://www.scvotes.org/node/181). Likewise, the relevant Nevada FAQ simply states that a voter who fails to respond to a confirmation notice and fails to vote may be purged, and goes on to state that a voter may receive such a notice if election mail is undeliverable or the voter has a change of address on file with the Postal Service, both valid under the NVRA. It does not say that a voter will be targeted for removal based on a failure to vote. *Id.* (Nev. Sec'y of State, Election Frequently Asked Questions, http://nvsos.gov/sos/elections/election-resources/faqs#453).

[11] Indeed, even under Petitioner's interpretation of the Failure-to-Vote Clause, the NVRA prohibits the procedures laid out in Illinois's and Hawaii's statutes. *See* Pet. at 31 (arguing that purging non-voters without notice or a two-election-cycle waiting period is

send notices to voters who have not voted over a certain time, IOWA CODE § 48A.28(2)(b), but Petitioner offers no evidence that Iowa's election officials have actually exercised that authority and removed voters on this basis.

B. More Development of the Law Is Needed in States that May Have Procedures Similar to Ohio's.

Respondents are aware of only five states that currently employ procedures that might be implicated by the Sixth Circuit's decision: Tennessee, Georgia, West Virginia, Oklahoma, and Pennsylvania. Of these states, only Georgia's statute has been challenged in a case currently pending before the Eleventh Circuit. As to the others, the record is silent as to how they implement their procedures, and whether they take additional steps to ensure that eligible individuals are not erroneously removed from the rolls "by reason of" their failure to vote. The absence of such evidence only underscores the value of allowing the issue to percolate in the lower courts.[12] And even if these states' list-maintenance practices are similar to Ohio's, that is all

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unlawful under the NVRA). Thus, even if the Sixth Circuit's decision were reversed, these statutes would still be preempted by the NVRA.

[12] Even among these states, Ohio's Supplemental Process is the most aggressive. Ohio has the *shortest* failure-to-vote trigger – a period of only two years – and, as a result, will presumably have a higher percentage of eligible voters erroneously subjected to the removal procedure.

the more reason for this Court to allow other circuits to weigh in on the matter before reviewing the question presented here.

The decision below, therefore, will not have the widespread impact that Petitioner claims, as the vast majority of states Petitioner cites will not be affected at all, and Petitioner's concern that an unspecified number of states will now face lawsuits over this narrow issue, *see* Pet. at 19-21, is unfounded. Without further percolation in any of these other states, or in any other court of appeals, there is no basis for this Court's intervention.

C. Ohio Has Ample Means to Maintain Accurate and Up-To-Date Voter Registration Rolls.

Petitioner also asserts that the question presented implicates important questions concerning election integrity because it "eliminat[es] *one* method" for removing voters from the voter rolls. *Id.* at 14 (emphasis added). Many other methods for voter-list maintenance remain at Petitioner's disposal, however, such as the methods used by at least 38 other states around the country whose practices in no way resemble Ohio's. Indeed, Petitioner himself is *already* using other list-maintenance procedures not impacted by the Sixth Circuit's ruling, including the NVRA safe harbor, statewide mailings to all registered voters, and membership in the Electronic Registration Information Center ("ERIC"), an interstate data-sharing system

that aggregates data from voter-registration lists, motor-vehicle departments, and other sources to identify individuals who have likely died or moved outside their jurisdiction of registration. *Id.* at 34.

While Petitioner has shown no actual impact on election integrity arising from the inability to purge infrequent voters, the harm avoided by the interim injunction was substantial. Petitioner readily acknowledges that the Supplemental Process removed at least 7,515 registered and eligible Ohio voters who would have been denied their right to vote this past November absent the decision of the court of appeals. Depriving qualified voters who have properly registered of their right to vote simply because they have not voted in recent elections poses a far greater threat to confidence in the democratic process. Petitioner's one-sided concerns about election integrity are hardly a basis for granting certiorari.

III. THE DECISION BELOW WAS CORRECT AND RAISES NO ISSUES WORTHY OF THIS COURT'S REVIEW.

Without other basis for certiorari review, Petitioner is left to argue that the Sixth Circuit erred in its interpretation of the statute. But mere error correction does not create a "compelling reason[]" for granting certiorari. Sup. Ct. Rule 10. In any event, the Sixth Circuit's interpretation of Section 8 of the NVRA is a straightforward – and correct – application of the

settled canons of statutory construction established by this Court.

The Sixth Circuit applied "the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, LLC v. Varsity Brands, Inc.*, ___ S. Ct. ___, 2017 WL 1066261, at *7 (Mar. 22, 2017) (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)). Giving the terms "results in" and "by reason of" their ordinary dictionary meaning, the court held that the Supplemental Process constitutes an unlawful list-maintenance program because it "results in" removal of voters from the voter rolls "by reason of" their failure to vote. Pet. App. at 21a; *see also Sebelius*, 133 S. Ct. at 1893 ("unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning"). The court also correctly held that Ohio's Supplemental Process violates HAVA, which reaffirms that the NVRA's removal process cannot be triggered "solely" by a failure to vote. Pet. App. at 21a-23a.

Petitioner advances three arguments in an attempt to manufacture errors creating an issue worthy of certiorari: (a) that the decision below raises constitutional issues that were better avoided; (b) that HAVA changed the NVRA's requirements; and (c) that failure to vote under Ohio's Supplemental Process is too attenuated from the act of removal to be considered a proximate cause of the removal. None has merit.

A. The Sixth Circuit's Decision Does Not Raise Constitutional Questions Because the NVRA Is Valid under the Elections Clause.

Petitioner argues that the court of appeals should have adopted an interpretation of the NVRA that permits the Supplemental Process in order to avoid raising any constitutional questions concerning the scope of congressional authority under the Elections Clause. U.S. CONST. art. I, § 4, cl. 1. But this case raises no such concerns. As this Court clearly reaffirmed in *ITCA*, registration procedures squarely fall under the umbrella of "Times, Places, and Manner" procedures that Congress is permitted to regulate for federal elections. *See* 133 S. Ct. at 2253 ("'Times, Places, and Manner' . . . are comprehensive words, which embrace authority to provide a complete code for congressional elections, *including . . . [the] regulations relating to registration*" found in the NVRA.) (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (emphasis added and internal quotation marks omitted). Since the Elections Clause authorizes Congress to displace a state's registration procedures for federal elections, Petitioner's other arguments about "Elephants in Mouseholes," "Government Structure," and "Laboratories of Democracy" are irrelevant. Pet. at 30-34. Indeed, this Court has already recognized that "[w]hen Congress legislates with respect to the 'Times, Places and Manner' of holding congressional elections, it *necessarily* displaces some element of a pre-existing legal regime erected by the

States." *ITCA*, 133 S. Ct. at 2257. Petitioner thus cannot now raise federalism concerns regarding the fact that the NVRA displaces parts of a state's registration regime to argue that the NVRA is unconstitutional; the Court has already considered and dismissed those concerns in this context.

Petitioner protests that prohibiting states from employing the roll-maintenance mechanisms of their choice *might* interfere with their ability to establish voter *qualifications* under the Constitution's Qualifications Clause. Pet. at 30; *see also* U.S. CONST. art. I, § 2, cl. 1; *ITCA*, 133 S. Ct. at 2257-58 (discussing the same). But as noted above, *ITCA* expressly held that registration concerns the time, place, and manner of holding federal elections, not voter qualifications. Ignoring *ITCA*, Petitioner contends that under some unspecified states' laws, registration *might* be considered a voting qualification rather a regulation of the manner by which they conduct elections. But surely states cannot circumvent Congress's authority under the Elections Clause simply by unilaterally declaring any time, place, or manner issue to be a "qualification" issue for federal elections. *See ITCA*, 133 S. Ct. at 2253 (The Elections Clause is necessary because leaving the "exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy." (quoting The Federalist No. 59 (A. Hamilton))).

In any event, Petitioner does not contend that registration is a voter qualification under *Ohio* law. *See*

Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.") (internal citations and quotation marks omitted).

Petitioner also fleetingly suggests that voting might *itself* be a voter qualification, Pet. at 30, rendering a failure to vote disqualifying. But that argument fails as a matter of state and federal law. Petitioner does not point to any provision of Ohio law suggesting that anyone who fails to vote thereby becomes ineligible to vote. Moreover, as the Senate noted in enacting the NVRA, in our system, citizens have the right to vote, and the right to choose not to vote – and should not be penalized for either choice. *See* S. REP. NO. 103-6, at *17. Petitioner's attempt to manufacture a constitutional issue that the Sixth Circuit should have avoided is squarely foreclosed by *ITCA*.

B. HAVA Did Not Change the NVRA's Requirements.

Petitioner next argues that a provision in the later-enacted HAVA supersedes or narrows the NVRA's prohibition on removing registrants for not voting. He argues that a provision of HAVA requiring application of the NVRA's roll-maintenance procedures and restrictions to the newly mandated statewide voter registration databases also effected an alteration in the meaning of the Failure-to-Vote

Clause. *See* Pet. at 25. According to Petitioner, by providing that "no registration may be removed solely by reason of a failure to vote," HAVA restricts the Failure-to-Vote Clause only to instances where the failure to vote alone – without the notice-and-waiting period required under the NVRA's Address-Confirmation Procedure – is used as the basis to remove a voter from the rolls. *Id.* But HAVA clearly states (in multiple places) that it should be construed as being "consistent with the" NVRA – not to supersede it. 52 U.S.C. § 21083(a)(4)(A). In 52 U.S.C. § 21145(a), Congress warns that "nothing in [HAVA] may be construed to authorize or require conduct prohibited under [the NVRA], or to supersede, restrict, or limit the application of" the NVRA. *Id.* § 21145(a). Thus, HAVA cannot be read to alter the NVRA's prohibition on list-maintenance procedures that "result in" the removal of a voter "by reason of failure to vote." *Id.* § 20507(b)(2).

This is especially the case where, as here, HAVA is wholly consistent with the NVRA's Failure-to-Vote Clause. *Id.* § 21083(a)(4)(A). Reading these statutes as a whole, HAVA's language is most naturally read as underscoring that failure to vote cannot be the reason for triggering removal; it can be considered *only* as part of the carefully articulated procedure used to confirm a *change of address for which the state has independent evidence. See Star Athletica*, 2017 WL 1066261, at *7 ("[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning. We thus look to the provisions of the whole

law to determine [a provision's] meaning." (citations and quotation marks omitted)). Had Congress intended to amend the NVRA's Failure-to-Vote Clause directly, it could easily have done so. But rather than eliminating or restricting the NVRA's prohibition on removing registrants for failure to vote, it added only a caveat for clarification of the NVRA's original language prohibiting list-maintenance procedures that "result in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote." 52 U.S.C. § 20507(b)(2). Specifically, HAVA simply clarified that the use of failure to vote as a component of the Address-Confirmation Procedure – and *only* in that limited context – is not prohibited by the much broader Failure-to-Vote Clause. Petitioner attempts to turn this helpful clarification into a sweeping change that undoes a key provision of NVRA. But "[t]he fact that [Congress] did not adopt" a "readily available" amendment "strongly supports" the conclusion that the NVRA's meaning did not change with the passage of HAVA. *NLRB v. SW General, Inc.*, ___ S. Ct. ___, 2017 WL 1050977, at *9 (Mar. 21, 2017) (quotation marks and citation omitted).

C. The Sixth Circuit Correctly Applied Settled Canons of Statutory Construction.

1. Ohio's Supplemental Process violates the plain terms of the Failure-to-Vote Clause.

Petitioner also errs in arguing that the Sixth Circuit failed to adhere to ordinary canons of statutory

construction; principally, that the court misconstrued the Failure-to-Vote Clause's "results in" language as a boundless prohibition on any removal where failure to vote is a "but-for" cause rather than requiring that it be a "proximate cause" for removal. Petitioner then argues that under Ohio's Supplemental Process, failure to vote is merely the attenuated, "but-for" cause, not the "proximate cause," for the voter's removal. Pet. at 22-24.

Nowhere, however, does the Sixth Circuit say or imply that the Failure-to-Vote Clause prohibits any removal where failure to vote was a "but-for" cause. Its interpretation of the statute is fully consistent with the notion of proximate causation. The court found that Ohio's Supplemental Process "constitutes perhaps the plainest possible example of a process that 'result[s] in' removal of a voter from the rolls by reason of his or her failure to vote." Pet. App. at 24a. That is because Ohio's Supplemental Process *expressly* relies on failure to vote – and failure to vote alone – to subject the voter to the Address-Confirmation Procedure, where there is no independent evidence of a change of address. As this Court has explained, the concept of proximate cause precludes liability only "where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014). Under Ohio's Supplemental Process, the initial two-year period of voter inactivity is the key event that triggers a voter's removal from the rolls. It cannot be said that when a voter is removed

pursuant to the Supplemental Process, failure to vote played only a "fortuitous" role in the voter's removal because it was followed by the Address-Confirmation Procedure.

Petitioner argues that under Ohio's Supplemental Process, the initial failure to vote for two years does not "cause" the voter's removal: According to the Petitioner, the true cause of removal is the voter's subsequent "failure to respond to a notice" sent as a result of that two-year period of inactivity. Pet. at 24. The NVRA cannot plausibly be read that way. Under the NVRA's "safe harbor," the voter's change of address, as reflected in the U.S. Postal Service's NCOA system, is quite plainly the cause of the voter's removal; the Address-Confirmation Procedure is used to confirm that change of address but it does not interrupt the causal link between the change-of-address information that triggered the removal process and the removal itself. But Petitioner argues that the analogous triggering information under the Supplemental Process – a citizen's failure to vote – is *not* the proximate cause of removal, even when it results in removal without any further affirmative act by the individual: If the voter continues not to vote and fails to take action in response to a notice, that voter is removed. As the Sixth Circuit explained, that is the plainest violation of the prohibition on removing voters from the voter rolls "by reason of" their failure to vote. In other words, under the Supplemental Process, failure to vote has a sufficiently close nexus to removal to constitute its proximate cause and therefore to run afoul of the Failure-to-Vote Clause.

Petitioner also invites this Court to reexamine the rule requiring narrow construction of exceptions to general statutory schemes. *Id.* at 26-28. Regardless of whether the Except Clause is construed narrowly or broadly or is understood as an exception or an "explanation," however, it cannot be interpreted to permit Ohio's Supplemental Process. HAVA's Except Clause simply serves to clarify that failure to vote *can* play a narrow role in a voter's removal, but only as part of the process for confirming independent evidence that a voter has moved. *See* Pub. L. No. 107-252, § 903 (2002) (headnote describing the amendment as a "[c]*larification* of [the] ability of election officials to remove registrants from [the] official list of voters on grounds of [a] change of residence"). If it were read to allow failure to vote to play a role in the removal of a voter from the rolls apart from the Address-Confirmation Procedure, then the exception would swallow the rule, rendering superfluous the NVRA's prohibition on penalizing voters for abstaining from voting. In other words, reading the NVRA's Failure-to-Vote Clause and HAVA's Except Clause together, failure to vote cannot serve both as the initial evidence of a change of address on the front-end and as confirmation of that change of address on the back-end, because that would lead, as it does under Ohio's Supplemental Process, to removal "by reason of" a failure to vote rather than by reason of a change of address.

2. Error correction is not a valid basis for granting certiorari.

At bottom, Petitioner's argument amounts to nothing more than a bare disagreement with the way in which the Sixth Circuit applied settled canons of statutory interpretation to conclude that Ohio's Supplemental Process violates the NVRA. The Sixth Circuit did not err. But even if it had, "error correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari." *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (Alito, J., concurring) (quoting S. Shapiro et al., *Supreme Court Practice* § 5.12(c)(3), p. 352 (10th ed. 2013)); *see also Magnum Imp. Co.*, 262 U.S. at 163 (holding that certiorari is not appropriate "merely to give the defeated party in the Circuit Court of Appeals another hearing"). Thus, even if the Sixth Circuit's decision were incorrect (and it is not), certiorari would not be warranted here.

IV. THIS CASE PRESENTS A POOR VEHICLE FOR THE QUESTION PRESENTED.

Finally, this case presents a poor vehicle for review because it arises in an interlocutory posture. With Petitioner's consent, this case was remanded to the district court for further proceedings prior to the petition being filed, and discovery and remedial proceedings are now ongoing in the district court. The interlocutory posture of this case "alone furnishe[s] sufficient ground for . . . denial" of the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251,

258 (1916). "[E]xcept in extraordinary cases, [a] writ [of certiorari] is not issued until final decree." *Id.*; *see also Bhd. of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 282 (9th ed. 2007) ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari."). Motions and briefing at the remedial phase of this case are set to conclude in the district court on July 25, 2017. As Petitioner notes, there is no pending election in Ohio. Pet. at 21. The next federal election will not take place until the May 8, 2018 primary, which is more than a year away. *See, e.g.*, OHIO REV. CODE § 3501.01(E)(1). Petitioner will suffer no prejudice from litigating this case to a final judgment, and seeking certiorari on a complete record, as is the normal course for this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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